EMPLOYMENT TRIBUNALS

Claimants: Mr V R Marmolejo-Acosta

Respondent: West Sussex County Council

Heard at: Southampton On: 1 February 2019

Before: Employment Judge Gardiner

Representation:

Claimant: In person
Respondent: Mrs F Gardiner, solicitor

JUDGMENT

In his role as a Family Support Assistant, the Claimant was not an employee. Accordingly the Employment Tribunal has no jurisdiction to consider a claim of unfair dismissal brought under Section 98(4) of the Employment Rights Act 1996. The Claimant's unfair dismissal claim is therefore struck out.

REASONS

1. This is a Preliminary Hearing to decide whether Mr Marmolejo-Acosta had the legal status of an employee in the work he was performing for West Sussex County Council. Unless Mr Marmolejo-Acosta can prove on the balance of probabilities that he was an employee, the Tribunal has no jurisdiction to decide his claim for unfair dismissal.

2. I have heard evidence from Mr Marmolejo-Acosta in support of his own case, and from Ms Knight, Relationship and Partnership Development Leader at the Respondent. Both had prepared witness statements, which they confirmed, and on which they were cross-examined. I was also taken to a limited number

of pages in an agreed bundle, and to two further documents, put in by Mr Marmolejo-Acosta.

3. Mr Marmolejo-Acosta was working in a role for the Council that by 2017 had been designated as Family Support Assistant. In this role, he supervised the contact between parents and children to comply with supervised contact orders made by the courts. An allegation was made against him in June 2017 on a safeguarding issue and there was a Police investigation. During the investigation he was suspended and not offered any work pending the outcome of the investigation, nor did he receive any pay. The Police investigation ended in April 2018 and no further action was taken against him. However, the Council decided that it did not want to offer him any further work as a Family Support Assistant. The suspension was not lifted. Instead he was told that he would not be offered any more work. It is that decision that Mr Marmolejo-Acosta says was an unfair dismissal.

4. The Council's position is that this was not an unfair dismissal because Mr Marmolejo-Acosta was never an employee. Instead he was a casual worker who had no guarantee of work and who was not obliged to accept any work was offered. As a result, there was no mutuality of obligation and therefore there was no employment contract.

Findings of fact

5. Mr Marmolejo-Acosta was first engaged in the role of Family Support Assistant or FSA back in 1998. At the time, it had a different title. There was no paperwork detailing the nature of the arrangement when he started work. No paperwork was issued to him since. I accept that he was never sent the standard form letter at page 36 of the bundle. This stated that there was no obligation to offer work and if offered there was no obligation on FSAs to accept work.

6. By April 2017 there were about 60 FSAs performing this role for the Council. In practice, the basis on which work was allocated to Mr Marmolejo-Acosta was the same as other FSAs and was as follows. FSAs were sent a spreadsheet showing the anticipated supervised contact sessions over the next two months. This was subject to substantial change. FSAs then responded offering to cover particular contact sessions. This response would be either by email or on the telephone. Where they had responded over the telephone, they would be asked to confirm by email that they would cover a particular supervised contact session. FSAs were not expected to work any minimum number of hours in any two-month period. The Council could not insist that FSAs perform particular supervision sessions or any supervision sessions at all.

7. Where FSAs had agreed to carry out particular supervised contact sessions, these sessions could be cancelled by the Council without any obligation to pay a cancellation fee. As a gesture of goodwill, FSAs were paid the anticipated fee when the engagement was cancelled within 24 hours. FSAs

were able to withdraw from supervised contact sessions for which they had been booked at any point, without any repercussions.

8. Mr Marmolejo-Acosta, along with the other FSAs, was expected to carry out the necessary training in order to remain eligible for work. However, this training was offered on various occasions. Some of the training was online training that could be undertaken flexibly to suit the convenience of the FSAs.

9. Mr Marmolejo-Acosta did not accept every assignment he was potentially offered. His evidence was that he turned down about 1 in 10 of the assignments he was offered. There was no sanction for doing so.

10. Before his suspension in June 2017, there were two previous periods, accordingly to the payroll system, lasting a few months at a time, when he did not work and was not paid.

11. Payment for work carried out was made through the payroll system. The correct sums to pay were assessed against claim forms submitted. Those claim forms recorded the particular hours worked and the mileage travelled, and deducted the tax that was payable. There was a significant fluctuation from one month to the next in the hours worked and the payments that the Council made.

12. Mr Marmolejo-Acosta accepted that his working pattern was irregular. He also stated in his witness statement that at two different training workshops he had been told that "we don't have to offer you work and you don't have to take on any work but you are like gold dust to us".

13. On 28 November 2018, Mr Marmolejo-Acosta received a letter which started "It is with regret that I accept your resignation from the post of Family Support Assistant". It continued : "We are keen to learn from the experience and reflections of staff leaving our employment". On 21 December 2018, Ms Knight wrote clarifying that the earlier letter was a standard WSCC letter sent to him in error. It said that the wording he had been sent was the wording that would be sent to employees who resign. It apologised that he had received a letter drafted in these terms, which should not have been sent to him as a casual worker.

Relevant legal principles

14. Ultimately the issue for the tribunal is whether the Claimant was an employee as defined in s230 of the Employment Rights Act 1996. That states that an employee is someone who works under a contract of employment. It has been left to caselaw to explain the essential features of a contract of employment. The classic starting point is the statement of MacKenna J in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497 at 515c where he said :

> "A contract of service exists if these three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other

> remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service … Freedom to do a job either by one's own hands or by another's is inconsistent with a contract of service, though a limited or occasional power of delegation may not be …"

15. As Stephenson LJ put it in *Nethermere (St Neots) Ltd v Gardiner [1984] ICR 612* at 623, "There must … be an irreducible minimum of obligation on each side to create a contract of service."

16. I have also had regard to *Carmichael v National Power* [1999] 1 WLR 2042 and *Autoclenz v Belcher* [2011] ICR 1157. Those cases indicate that it is necessary to identify the true terms of the arrangement. It is necessary to see whether the terms of the arrangement are contained in any relevant documents. Unless those documents constituted an exclusive record of the legal arrangements, it is necessary to look at how the parties operated their arrangement in practice to see whether that sheds light on the true nature of the agreement between the parties.

17. Mrs Gardiner, for the Respondent, referred me to *Secretary of State for Justice v Windle* [2016] ICR 728. *Windle* is not directly on point. In that case it was accepted that the claimants were not employees and so the issue of employment status was not before the Court of Appeal.

Conclusion

18. I first have to determine the terms that governed the arrangement. This was an arrangement that was never reduced to writing in Mr Marmolejo-Acosta's case. There was an oral agreement that Mr Marmolejo-Acosta would be engaged by the Council from time to time to facilitate supervised contact between parents and their children, undertaking the role of a Family Support Assistant. He was entitled to decide whether to accept each assignment he was offered. When he did the role, he had to perform it in accordance with the written brief he was provided and the training he had received.

19. There were no pension arrangements, no provision for sickness absence, and no specific disciplinary procedure that applied to the role. A different disciplinary procedure applied to those staff in other roles that the Council accepted were working as employees. It is relevant to have regard to what was said by the Council in training sessions; and to Mr Marmalejo-Acosta's failure to object to the basis on which the work was available.

20. My conclusion is that there was no mutuality of obligation here. The Council was not obliged to offer Mr Marmolejo-Acosta work or to pay him if they did not offer him work. From the time of his suspension to the end of the arrangement he was not offered work nor was he paid. It has not been suggested, nor do I find, this was a breach of contract.

21. Equally Mr Marmolejo-Acosta was not obliged to accept the work that was offered. That is what happened during the period from October 2011 to February 2012; between October 2013 and April 2014, and for 10% of the assignments that he was offered at other periods of time.

22. The way in which the arrangement operated in practice was consistent with what he was told in his training sessions on two occasions : "we don't have to offer you work and you don't have to take on any work".

23. In his witness statement, Mr Marmolejo-Acosta states that for the last three years he had been working with intensive adoption support for a specific family. He said that this particular work was regular, was done weekly and on set days. I do not regard this pattern of work as indicative that he was performing the work as an employee. Rather, for a lengthy period of time, it suited both parties for the needs of this particular family to be served with the same Family Support Assistant providing the same service on a regular basis. However, there was no obligation on the Council to continue providing this work, nor was there any obligation on Mr Marmolejo-Acosta to continue to accept any work that was provided in relation to this particular family.

24. When he did work, he was paid by the hour for the work that he carried out. Those specific episodes of work did not give him the status of an employee when he was not performing a particular assignment. As a result, he was not an employee when he was told that he would not be offered any further work. The Tribunal does not have jurisdiction to consider his unfair dismissal claim.

25. I note that his discrimination claims were withdrawn as a result of the discussion at the hearing before Employment Judge Matthews. There is no other claim before the Tribunal, apart from the unfair dismissal claim. Although his Schedule of Loss mentions a claim for wrongful dismissal, this was not included in the ET1 and was not recorded as an issue before Employment Judge Matthews. As a result, this claim is only a claim for unfair dismissal and that claim must be struck out because the Tribunal has no jurisdiction to consider it.

Employoyjment Judge Gardiner

Date: 6 February 2019